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No. 88-1374

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

THE JIMMY SWAGGART MINISTRIES,
Appellant,

v.

BOARD OF EQUALIZATION OF CALIFORNIA,
Appellee.

On Appeal from the Court of Appeal, State of California Fourth Appellate District, Division One

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BRIEF AMICUS CURIAE OF THE EVANGELICAL COUNCIL FOR FINANCIAL ACCOUNTABILITY, FOCUS ON THE FAMILY, INSIGHT FOR LIVING, THE MASTER'S COMMUNICATION, AND PRISON FELLOWSHIP, AS AMICI CURIAE IN SUPPORT OF APPELLANT

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QUESTIONS PRESENTED

I. Whether the imposition of the burden of collecting and remitting use tax on national religious ministries excessively entangles the government in the internal affairs of religious bodies?

II. Whether the imposition of the burden of collecting and remitting use tax on national religous ministries has a chilling effect on the protected activity of disseminating religious messages to those willing to hear them?

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STATEMENTS OF INTEREST

Amici are national evangelical ministries that in many important respects are quite diverse and distinct from one another. They do, however, share two things in common: (1) a common goal of spreading the *Gospel* of Jesus Christ to all who wish to hear it, and (2) a commitment of *going from state to state* to proclaim that

Gospel. Thus amici are aptly described as *itinerant evangelists.* They frequently travel from state to state for the purpose of conducting evangelistic meetings, religious seminars and pastoral conferences.

For the very reason that most of the amici filing this brief are typically "out-of-state," they have little, if any, influence over the political processes that determine the imposition of tax burdens by state and local governments, and must rely on the protection of the First Amendment to secure their vulnerable religious freedoms. For the same reason, the multi-state character of amici gives them a special interest in the decision of the California Court of Appel to empower the thousands of taxing authorities in America to impose the burden of collection and remission of sales and use tax on ministries for engaging in the distribution of religious literature and sacred music.

The Evangelical Council for Financial Accountability (ECFA) was founded in 1979 as an association of evangelical, non-profit organizations requiring high standards of financial accountability and disclosure to donors, government and other interested persons. ECFA certifies over 560 Christian ministries for financial accountability. The interests of ECFA in this case are three-fold. First, most of the ministries certified by ECFA serve constituents in states other than where their principal office is located. To require an "out-of-state" ministry to serve as a sales and use tax collector on religious literature mailed into the taxing state because the ministry has held a religious conference, crusade, seminar or other religious meeting in the taxing state will have a chilling effect on the free exercise of religion for these ministries. Many ministries will be forced to decide whether it is worth conducting a religious meeting in the taxing state if the result will be for the ministry to submit in perpetuity to the administrative nightmare of complying with hundreds of separate sales and use tax jurisdictions within the taxing state. Second, the decision below invites sig-

nificant entanglement of taxing authorities with religious organizations in determining whether funds received were, in fact, monies on a "sale" or a "donation." ECFA members have multiple variations in the way they receive funds and distribute religious literature and other teaching materials. Frequently, materials are sent out by a ministry to donors solely as a gift from the ministry rather than as a sale or a *quid pro quo* "premium" for a gift sent to the ministry. The responsibility for determining whether each transaction is a "donation" or "sale" will place a significant burden on the ministry's ability to distribute religious materials to its constituents. Third, ECFA is concerned that the type of taxes at issue in this case will be selectively enforced more frequently against highly visible or unpopular ministries than on large and popular denominations. Undoubtedly, states will overlook tax enforcement that is not economically or politically feasible.

Focus on the Family (FOF) is a California corporation, organized under the Religious Non-Profit Corporations Law of the State of California. Its principal office is located in Pomona, California. FOF also maintains an office in Washington, D.C., but has no other branch offices. It does not maintain a staff or conduct business in states other than California. The articles of incorporation of FOF provide that it has been organized "for the express purpose of spreading and propagating the Gospel of Jesus Christ." To effectuate that purpose it maintains a daily radio broadcast that is heard in all 50 states. As an integral component of this purpose, FOF distributes by mail book, audio and video tapes, pamphlets, magazines and various other religious educational materials designed to complement and enhance the religious purposes of the corporation. FOF presently gives away the materials that it distributes to its constituents for the purpose of providing help to families seeking guidance in child-rearing, marital relations, and financial respon-

sibility. If it were to begin to sell these materials, the application of the decision below to FOF would impose a significant administrative burden, necessitating the reprogramming of a very costly and extensive computer system, the creation of an entire new accounting and reporting department, with a substantially increased number of employees and an attendant increase in operating costs. It is entirely foreseeable that the application of the decision below to FOF would result in a substantial reduction in its charitable/religious activities, specifically in the distribution of resource materials intended to benefit the families of its constituents. This reduction in distribution of religious literature would be attendant upon the recordkeeping and reporting system envisoned under the rule devised by the court below.

Insight for Living (IFL), founded in 1978 is a California non-profit religious corporation with its principal offices in Fullerton, California. IFL is a ministry that teaches the Bible, as the inspired Word of God, by means of an internationally broadcast radio program and printed Bible study materials, using primarily sermons and literature of Dr. Charles R. Swindoll. The ministry also provides biblically based personal counselling by mail. Its radio programs air over 700 stations each day. The interest of IFL in this case flows from the fact that IFL has a ministry to people in all 50 states. It would very likely be forced to restrict and even withdraw from conducting ministry activities in all but the most populous states if the decision below were affirmed. The potential administrative burden placed on IFL would be incalculable. IFL could not afford to comply with the sales and use tax laws of every state where it has constituents.

The Master's Communication (TMC), founded in 1978, is a California non-profit religious corporation with its principal offices located in North Hollywood, California. Its ministry uses mass communications media, including

radio, to expand the teaching ministry of Dr. John F. MacArthur, Jr. TMC has constituents in all 50 states with a daily radio program aired on over 360 stations. The ministry has over 21,000 constituents in at least 16 states where it has never held any conference, crusade, seminar, lecture or other religious meeting in connection with its ministry. If this Court were to affirm the judgment below, the costly administrative burden imposed by the obligation of serving as a tax collector would force on TMC the difficult decision of having to forego expansion of its ministry into states where it currently has limited contacts.

Prison Fellowship (PF) is a national non-profit organization founded in 1976 by Charles W. Colson. Its purpose is to assist local Christian churches in ministering to prisoners, ex-prisoners and their families, and to work for a just and effective criminal justice system. PF seeks to encourage and to mobilize Christians to help restore transcendent, biblically based values in our society, as part of a permanent solution to the problem of crime. PF is active in over 550 state and federal prisons, working through its volunteers and employees with more than 75,000 prison inmates and family members each year. As a crucial component of its efforts to encourage and mobilize Christians to restore ex-offenders to society, PF annually distributes over 150,000 pieces of literature in all 50 states. Some of this literature is sold, while some is given away to individuals who provide financial support. Affirming the judgment below would be a sudden elimination of a long established practice of exempting the distribution of religious literature from sales and use tax. This result would place a substantial administrative burden on PF by increasing dramatically the number of jurisdictions for which it would have to collect sales and use tax for the distribution of literature directly related to its religious educational ministry. This administrative burden would require PF to divert re-

sources away from direct ministry to prisoners. The net effect would be to discourage the distribution of religious literature by PF as a means of furthering its religious tenets that Christians are to be "salt and light" in American culture.

Pursuant to Rule 36.2 of this Court, amici have obtained the consent of counsel to the parties to file this brief. The originals of the consent letters have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

The court of appeal imposed on a national religious ministry the burden of collecting and remitting use tax for engaging in a core religious activity, the distribution of religious literature. If this judgment is affirmed, the door will be wide open for over 7,000 taxing jurisdictions to impose a similar burden on national religious ministries throughout the country.

In *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), this Court held that states and local governments could no more impose a license tax on itinerant evangelists distributing religious literature than it could require a local preacher to register with the government and obtain a license to preach. As Justice Douglas stated in *Murdock*:

> "The taxes imposed by this ordinance can hardly help but be as severe and telling in their impact on the freedom of the press and religion as the 'taxes on knowledge' at which the First Amendment was partly aimed. They may indeed operate even more subtly. Itinerant evangelists moving throughout a state or from state to state would feel immediately the cumulative effect of such ordinances as they become fashionable. The way of the religious dissenter has long been hard. But if the formula of this type of ordinance is approved, a new device for the suppression of religious minorities will have been found. This method of disseminating religious beliefs can be

> crushed and closed out by the sheer weight of the toll or tribute which is exacted town by town, village by village. The spread of religious ideas through personal visitations by the literature ministry of numerous religious groups would be stopped."

Id. at 114-115.

A year later in *Follett v. McCormick*, 321 U.S. 573 (1944), the Court extended the same principle of constitutionally mandated tax immunity to preachers going door to door distributing religious literature in their own home towns. Justice Reed, who had written the opinion of the Court in *Jones v. Opelika*, 316 U.S. 584 (1942), and who had dissented in *Murdock*, 319 U.S. at 117-134, switched his vote in *Follett* and accepted the conclusion that "distribution of religious literature in return for money when done as a method of spreading the distributor's religious beliefs is an exercise of religion within the First Amendment." *Follett, supra*, 321 U.S. at 578 (Reed, J., concurring).

Relying on *Murdock*, *Follett*, and an Opinion of the California Attorney General, No. 79-524, J.A. 14-15, squarely based on these decisions, appellant in this case has challenged on First Amendment religion clause grounds (a) the application of sales tax to its distribution of Bibles, sermons and sacred music to its own religious adherents at evangelistic crusades held occasionally in California, and (b) the application of use tax to its distribution by mail of the same sorts of religious literature to adherents in California from its headquarters to Louisiana.

The plurality opinion announcing the judgment of the Court in *Texas Monthly, Inc. v. Bullock*, 109 S.Ct. 980 (1989), cast doubt on the continuing vitality of *Murdock* and *Follett*. *Id.* at 903. The plurality fairly invited this brief and those submitted by other religious organizations such as the Watchtower Bible and

Tract Society (the original free exercise claimants in *Murdock* and *Follett*) and the National Council of Churches of Christ in the United States (the largest ecumenical coalition of Protestant and Orthodox Christian bodies). For although no religious organization was a party, an intervenor, or an amicus in *Texas Monthly*, the plurality opinion nonetheless concluded on the spare record in that case that the imposition of the burden of sales and use tax liability directly on the distribution of religious literature by religious organizations to their members would not "inhibit religious activity." *Id.* at 901.

Amici urge this Court to reconsider that conclusion in the light of the actual experience of religious ministries that are national in scope. This brief offers two reasons why the court of appeal in this case should be reversed and the views advanced by the plurality in *Texas Monthly* should not be followed. First, the imposition of the burden of collecting and remitting use tax on national religious ministries for the distribution of religious literature will excessively entangle the government in the internal affairs of religious bodies. Second, the imposition of the burden of collecting and remitting use tax on national religious ministries for the distribution of religious literature will have a chilling effect on the protected activity of disseminating religious messages to those willing to hear them.

ARGUMENT

I. The Imposition Of The Burden Of Collecting And Remitting Use Tax On National Religious Ministries Will Excessively Entangle The Government In The Internal Affairs Of Religious Bodies.

In *Watson v. Jones*, 80 U.S. (13 Wall.) 697 (1871), this Court first announced the principle of nonentanglement by the government in ecclesiastical matters. In *Watson*, Justice Miller stated: "The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of civil authority." *Id.* at 730. In short, the *Watson* principle means that there must be mutuality of freedom for both church and state.[1] Unlike *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), however, this case presents no plausible issue of improper intermeddling by the church,[2] in the realm of the government. On the contrary, as applied to the question presented in this case, the *Watson* rule suggests that it is constitutionally impermissible to impose the burden of sales and use tax directly on the core protected activity of distributing religious literature to religious adherents.

As amici note below, the imposition of this burden will inevitably engage the government in determinations of "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standards of morals required of them," as well as in determinations of "the usages and customs, the written laws and fundamental organization of every re-

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[1] It should, however, be noted that the text of the First Amendment sets limits on governmental authority: "Congress shall make no law . . ." U.S. Const. Am. I. See also U.S. Const. Am. XIV: "No State shall deprive any person of . . . liberty . . . without due process of law."

[2] The term "church" in this brief is not restricted to any religious body, but includes all such bodies.

ligious denomination." *Id.* at 733. Under *Watson*, these sorts of inquiries are prohibited to federal and state judges, who take an oath to uphold the Constitution: "courts must be incompetent judges of matters of faith, discipline, and doctrine." *Id.* at 732. *See also Thomas v. Review Bd. of Indiana Employment Security Division*, 450 U.S. 707, 716 (1981). Whether deeply probing or merely clumsy, such inquiries about religious practices should be no less prohibited when indulged in by state tax collectors and auditors, who are neither trained nor bound by oath to respect the fragile civil liberties of taxpayers.

The *Watson* principle of nonentanglement, now acknowledged as constitutional in stature,[3] has been reinforced in subsequent decisions of this Court dealing with the limited authority of secular courts to probe into the affairs of religious bodies. For example, in his separate concurring opinion in *Maryland & Virginia Eldership v. Church of God at Sharpsburg*, 397 U.S. 367 (1970), Justice Brennan warned of the particular danger of probing "into the allocation of power within a church so as to decide where religious law placed control over the use of church property". *Id.* at 369 (Brennan, J., concurring) (1970). In *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664 (1970), Justice Brennan also warned of general danger of extensive inquiry into the financial structures of a religious body. *Id.* at 691 (Brennan, J., concurring). Similarly, in *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976), Justice

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[3] *Watson* was a diversity case decided before the religion clauses were deemed to be incorporated against the States through the due process clause of the Fourteenth Amendment. See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296 (1940), and *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947). In *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969), this Court clarified that the principles announced in *Watson* are now binding on the States as a matter of constitutional law, not as a matter of "federal common law."

Brennan noted that the First Amendment prohibits courts from probing deeply into matters of church polity and organization. *Id.* at 698, 713, 721.

Those warnings are still timely and are highly relevant to the resolution of this case, for unless the court of appeal is reversed, the administrators and auditors of the more than 7,000 taxing jurisdictions in this country will have been given a free hand: (1) to characterize the spiritual "usages and customs" of religious bodies as commercial transactions in violation of *Watson*, (2) to conduct tax audits probing "into the allocation of power within a church" in violation of *Maryland & Virginia Eldership*, (3) to inquire extensively into the financial structures of a religious body in violation of *Walz*, and (4) to probe deeply into matters of church polity and organization in violation of *Milivojevich*.

Another line of cases, dealing with state aid to church-operated schools, has also developed the principle of non-entanglement. *Lemon v. Kurtzman*, 403 U.S. 602, 614-622 (1971); *Aguilar v. Felton*, 473 U.S. 402 (1985). By its very terms, the standard of "excessive entanglement" admits of degrees. Some contacts between church and state are unavoidable. *Lemon, supra*, 403 U.S. at 614. When these contacts are permissible, it is not so much because they happen infrequently, as that when they do occur they are not very intrusive into the religious ministry of the church. *Tony and Susan Alamo Foundation v. Sec. of Labor*, 471 U.S. 290, 305 (1985).

The principle of avoiding excessive governmental entanglement with religious bodies, moreover, has been extended to cases setting limits on the regulatory authority of the government over religious bodies. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979); *Corp. of Presiding Bishop v. Amos*, 107 S.Ct. 2862, 2871 (1987). Indeed, this Court expressly acknowledged that the statutory exemption sustained in *Amos* had the legitimate purpose and effect of eliminating the need for entangling

case-by-case inquiries by governmental officials into the scope of a church's religious mission. *Id.* at 2868, 2870; see also at 2871 (Brennan, J., concurring, citing Laycock, *Toward a General Theory of the Religious Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373 (1981)).

A leading case developing the theme of nonentanglement, a case directly on point to the present case, is *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664 (1970). In *Walz* the Court voiced hypothetical concerns about potential danger to religious freedom if a regimen of taxation of religious bodies were given full scope. "Elimination of [tax] exemption would tend to expand the involvement of government [with churches] by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes." *Id.* at 674. The record in this case discloses that the potential danger feared in *Walz* has now become actual or threatened injury. Appellee's auditors engaged in the very sort of intrusive monitoring and surveillance that the *Walz* court deemed a paradigm of "excessive entanglement." As in *Walz*, a schema of exemption for religion turns out to be the best way of keeping the government from intruding too deeply into spiritual matters beyond its ken. *Id.* at 674.

The court of appeal got the constitutional principle of nonentanglement wrong by making it look simple. The lower court apparently accepted the contention of the appellee that the distinction between taxable sales and exempt contributions is an easy one for an outsider to draw. In religious matters, however, "things are seldom what they seem." For example, employment practices that are grounded in deeply religious concerns may seem "purely secular" to an outsider and therefore readily amenable to governmental regulation. This misperception of religious reality by an outsider did not inhibit

this Court from recognizing the need to accommodate the religious perspective of a religious employer with respect to the hiring and termination of its own employees. *Amos, supra.*

The likelihood that state tax officials will be sensitive to the free speech and free exercise concerns of non-profit organizations they face in an adversarial administrative setting is slim. To the contrary, the probability that religious organizations will become the target of persons insensitive, if not hostile, to their religious perspective is high. A major difficulty is lurking in the use of commercial images to analyze religious beliefs and practices. In any event it is risky to allow the government to draw fine lines in this area.

Some lines are easier than others to draw. It may not be easy in all instances to draw a bright line between exempt income and unrelated business income. See, e.g., J. Galloway, *The Unrelated Business Income Tax* (1982). Nevertheless, amici acknowledge that federal tax officials are authorized to engage in this form of line-drawing, even where the income of a church is at issue. Indeed, as the amicus brief for the National Council of Churches filed in this case notes, two major religious organizations —the National Council of Churches and the United States Catholic Conference—testified before the House Ways and Means Committee in 1969 that as a matter of sound social policy churches should not be exempt from federal taxation on income derived from business unrelated to their exempt religious purposes. Analogously, amici concede that if a church engages in plainly commercial transactions, they may subject themselves to that limited extent to sales and use tax liability on income derived from such sales.[4]

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[4] Appellant did not seek a refund for the tax on the sales of various objects such as T-shirts and mugs that it did not regard as having "specific religious-message content." J.S. App. A3-A4

Other kinds of line-drawing, such as that attempted by the appellee here, involve the danger of governmental intrusion into the spiritual convictions of religious bodies, and should be prohibited on that ground alone. For example, much more difficult than the distinction between related and unrelated income is the attempt to measure what is meant by something of spiritual value received from the church. Appellee must surely concede that it may not tax the preaching of a sermon or the hearing of it, even if a collection plate is passed at the service in which the sermon is delivered. The income of a church derived from pure contributions to the church is beyond the reach of the tax collector, whether as a constitutional principle or as a matter of state public policy. See, e.g., Calif. Rev. & Tax Code § 23701d.

Exempt gifts do not become taxable by giving them another label, or by falsely mischaracterizing the spiritual nature of the "transaction" in which the religious adherent receives something of spiritual value from the church. As this record illustrates, moreover, it was impossible for the accountants and auditors who poured over appellant's records to differentiate carefully between contributions and income derived from the "sale" of religious literature. J.A. 165-169, Tr. 169-171. Indeed, appellee's demand for tax payment was concededly based on a rough estimate of tax liabiilty, one that seems plainly overstated in light of the dubious criteria employed to arrive at a final figure. J.A. 148-152, 165-169, Tr. 153-157, 169-171.

Once the genie of allowing the government to define the meaning of "spiritual value" is out of the bottle, it will be impossible to stuff the genie back into bottle without severe damage to religious freedom arising from the government's delving into religious beliefs. The "value" placed upon the Scriptures and views of the

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n.3. The issue squarely before the Court in this appeal is the permissibility of taxation of the distribution of religious literature.

afterlife related to the "sale" of indulgences were at the heart of the theological controversies that tore Western Christianity apart during the Reformation of the church in the sixteenth century. The bitter divisions among Christians in the aftermath of the Reformation generated "turmoil, civil strife, and persecution" that were very much in mind at the time of the framing of the First Amendment. *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947).

Whatever one's views of these religious controversies, the American approach to them is that they are not susceptible of resolution by the government. This Court has made clear on several occasions that "it is not within the judicial function and judicial competence to inquire [about perceptions] of the commands of faith." *Thomas v. Review Bd. of Indiana Employment Security Division*, 450 U.S. 707, 716 (1981); see also *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *United States v. Ballard*, 322 U.S. 78 (1944).

To allow states to redefine the distribution of religious literature by a church to its own believers as a purely commercial transaction is to invite the inevitable and impermissible risk that the administrators of the more than 7,000 taxing jurisdictions in this country will be set loose to rummage around among sincerely held religious beliefs and practices, in search of activities that they might characterize as a "sale." If "courts are not arbiters of scriptural interpretation," *Thomas*, *supra*, 450 U.S. at 716, tax collectors have no greater ability or warrant to attempt to discern these matters. For this reason alone, this Court should not countenance any expansion of taxing authority into an area rife with danger for religious freedom, let alone the exponential expansion of governmental supervision and surveillance of churches implicated by the decision below.

When the taxman cometh, he generally does so for the obvious purpose of discovering whether there are

means of enhancing governmental revenues. Recognizing that federal tax officials may lack sensitivity in dealing with taxpayers, Congress recently enacted the Omnibus Taxpayers' Bill of Rights. P.L. No. 100-647, 100 Stat. 3342 (1988). Recognizing further that the free exercise of religion may not survive hostile or aggressive auditing of religious bodies, Congress has also set statutory limits on the power of the IRS to conduct tax investigations of these organizations. Church Audit Procedure Act, 26 U.S.C. § 7611; see also § 7605(c) and S. Rept. No. 91-552, 91st Cong., 1st Sess., 1969-3 C.B. 423, 468, and Int. Rev. Regs. § 301.7605-1(c)(1). There is no such legislation in California to inform, guide or structure the discretion of the appellee. Amici are aware of no state legislation parallel to the federal Church Audit Procedure Act. Indeed, the record in this case discloses that the appellee threatened criminal sanctions unless the appellant registered with the state as its agent for tax collection purposes. When the Board of Equalization had completed its extensive audit of the financial records of the appellant church, one Lamb wrote as follows on behalf of appellee to counsel for the church: "We must have an immediate response sending the completed applications registering your organization for its past and future sales activities in this state. *Any California sales at this time are strictly illegal and the officers of the organization are guilty of a misdemeanor.*" (J.S. App. E1-E2).

All states that impose sales and use tax attach criminal penalties to failure to comply with the complicated statutes and regulations relating to them. Most of the states make some dimension of noncompliance a felony.[5] Amici do not contend that they have a constitutional right to be exempt from every form of taxation. In the normal course of events in a sane society, sound prosecutorial discretion may be relied upon to avert the threat of applying

[5] See Table 2, column 2 in Appendix A to Appellant's Brief.

these criminal penalties to religious bodies, at least when they are making plausible claims of exemption, whether provided by statute or, as appellant and amici maintain here, required by the Constitution. If, however, the aggressive posture of the appellee is a preview of what churches can expect in the future from unbridled tax collectors, amici can only urge this Court to join them in "alarm at the first experiment on our liberties." J. Madison, *Memorial and Remonstrance* as cited in *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (Appendix to opinion of Rutledge, J., dissenting).

II. The Imposition Of The Burden Of Collecting And Remitting Use Tax On National Religious Ministries Will Have A Chilling Effect On The Protected Activity Of Disseminating Religious Messages To Those Willing To Hear Them.

Very recently, the plurality opinion in *Texas Monthly* suggested that the imposition of sales tax collection responsibility on religious communities would not "inhibit religious activity." 109 S. Ct. at 901. Amici respectfully disagree with this suggestion, adopted by three of the Justices in *Texas Monthly*, where the record was not fully developed on the impact on religious freedom, perhaps because no religious organization was a party, an intervenor, or an amicus in that case.

As the statement of interests suggests, *supra*, at 1, amici are aptly described as *itinerant evangelists*. They frequently travel from state to state for the purpose of conducting evangelistic meetings, religious seminars, and pastoral conferences. For that reason the typically multi-state character of most of the amici puts them in a unique position to inform this Court of the substantial burden that an affirmance of the decision below would have on their ministries.

The court of appeal imposed on a national religious ministry the burden of collecting and remitting use tax

for engaging in a core religious activity, the distribution of religious literature. If this judgment is affirmed, the door will be wide open for taxing jurisdictions all over the country to impose a similar burden on national religious ministries.

In *National Bellas Hess v. Dept. of Revenue*, 386 U.S. 753, 759 note 12 (1967) the Court noted that at that time there were over 2,300 separate taxing authorities with differing sales and use tax rates. The Court ruled that it was unreasonable to impose use tax collection responsibility on merchants whose only contact with a State is sending materials to customers by mail or common carrier. A little over two decades later, there are over 7,000 such taxing jurisdictions.[6] We are now in a regulatory climate where the imposition of use tax liability on a national religious ministry is impermissible because it would severely burden the ministry by getting it bogged down in a morass of filing requirements and audit procedures that differ among the thousands of taxing jurisdictions where the ministry might have adherents.[7]

As the particular statements of interest in this brief illustrate, *supra*, at 1-6, the sheer complexity of this form of taxation, amply illustrated in the tables accompanying the appellant's brief, means that the cost of compliance for these religious ministries would be so high that many of them will hesitate to engage in a core religious activity. The cost of the burden on churches

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[6] See Table 2 in Appendix A to Appellant's Brief (listing welter of varying sales and use tax rates by states and selected taxing jurisdictions).

[7] See Table 3 (listing licensing requirements, imposition of criminal sanctions for noncompliance with sales and use tax laws, and other regulations relating to these laws) and Table 4 listing monthly, bi-monthly, quarterly, semi-annual or annual filing deadlines among the several states and even within the same state) in Appendix A to Appellant's Brief.

should not be measured by direct cost of paying *sales* tax; that burden may be small.[8] But the hidden, indirect cost of administering the multi-state burden of collecting and remitting *use* tax would be phenomenal.[9]

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[8] Independent Sector recently sponsored a national survey of the activities and finances of religious congregations in the United States. The survey was conducted by the Gallup Organization, and the findings are analyzed by Virginia Hodgkinson, Murray Weitzman, and Arthur Kirsch in a publication entitled *From Belief to Commitment* (1988). According to this study, only 1% of revenue of churches derive from "sales" of products or literature. Table 4.23, *id.* at 47. That figure would probably be significantly higher in the case of national religious ministries such as amici, for whom the distribution of religious literature to their constituents is a major activity.

[9] To support its contention that use tax collection liability would be excessively burdensome and entangling, appellant made the following offer of proof at trial: "The accounting involvement to collect, report, and file sales and use tax returns in all of these taxing jurisdictions throughout the United States would be an insurmountable burden for churches to bear in regard to the expense of distributing their religious message. The accounting and legal involvement required would be: (1) to determine the tax in each different location; (2) to keep track of all of the changes in that tax on at least a monthly basis; (3) to collect the different tax from individuals in each of those locations; (4) to report the different tax; (5) to secure and file returns in each of those locales; (6) to respond to audit inquiries in each of those locales; (7) to devise some method in many jurisdictions of advertising the price and the tax rate so that the individuals solicited for such donations or sales would know the amount of tax to send with their request so that the proper amount could be collected; (8) to develop a procedure to dub a different advertisement onto each tape for each different television station locale, which now exceeds 600 local television stations plus thousands of local cable outlets the dubbed advertisement would have to be flexible enough to state the varying tax rates for the varying locations to which [appellant] would be required to mail religious-content materials within the viewing area of that station or cable outlet); (9) to prepare receipts to each of these individuals to properly account for the proper rate of tax; (10) to establish and maintain an extensive library constantly to provide for each of the thousands of taxing jurisdictions within the United States

In the aggregate, the cumulative burdens of attempting to comply with a host of complex and confusing regulations would transform a national religious ministry into a tax collection agency. See *Bellas Hess*, *supra*, 386 U.S. at 759-760, and *Murdock*, *supra*, 319 U.S. at 115.

Faced with averting this undesirable end, religious leaders would then be forced to curb their religious activity, at least in jurisdictions that would assert regulatory jurisdiction over the national ministry by virtue of an occasional presence of a religious leader in that state for a pastoral visit or an evangelistic crusade. In this way, contrary to the view expressed by the plurality in *Texas Monthly*, the burden of sales and use tax, considered together as a unitary taxing mechanism, would impose severe and unjustifiable regulatory burdens on national religious ministries.

This Court should avoid that result for the same reason that prompted its concerns over the risk of chilling the First Amendment rights of freedom of speech and of the press. Especially relevant are those cases where the First Amendment bars liability for false and defamatory statements, themselves of no First Amendment concern, because the risk of liability for mistakes would deter true speech as well as false, or would diminish the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). As Justice Brennan noted in *Sullivan*, the risk of incurring liability for damages from libel actions will cause speakers to "steer far wider of the unlawful zone." *Id.* at 277-79, quoting *Speiser v. Randall*, 357 U.S. 513, 526

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in state, county, municipal, and other special taxing districts." J.A. 204-209.

(1957). The concern that newspaper editors would censor themselves led the concurring Justices in *Sullivan* to advocate an absolute rule protecting the press against damages for the libel of a public official. *Id.* at 293 (Black, J., concurring) and at 297 (Goldberg, J., concurring). See also *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772 (1986) (even private figure must bear burden of proving that defamatory speech is false, lest true speech be deterred).

This Court has afforded special protection to media defendants because they are primary institutions whereby our cherished rights of freedom of expression and of communication are preserved. *Sullivan*, 376 U.S. at 266. Since churches are the primary institutions whereby freedom of religion is preserved, a similar logic has led some courts to recognize that religious communities are entitled to at least as much protection as commercial newspapers, by extending the *Sullivan* rule to church defendants in a libel action. *McNair v. Worldwide Church of God*, 197 Cal.App.3d 363 (1987).

In *Sullivan*, moreover, the Supreme Court expressly adverted to the potential chilling effect of imposing punitive damage awards against media defendants in defamation actions brought by a public official. 376 U.S. at 262, 267. And the Court fashioned a constitutional rule that malice could not be assumed or inferred, but must be shown to be actual in a particular instance. Considering the case "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open" *id.* at 270, indeed, that "erroneous statement is inevitable in free debate," *id.* at 271, the Court required that in order to prevail in a defamation action, a public official must prove "actual malice," or that the publication was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-280.

In *Gertz v. Robert Welch*, 418 N.S. 323 (1974), this Court extended the *Sullivan* rule to prohibit imposition of punitive damages on media defendants, "at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." *Id.* at 349.

Among the rationales offered for the result in *Gertz*, two have special relevance to this case. First, Justice Powell noted the danger of a chilling effect arising from the "largely uncontrolled discretion of juries to award damages where there is no loss." This possibility "unnecessarily compounds the potential of any system of liability for defamatory falsehood to *inhibit the vigorous exercise of First Amendment freedoms*" and "unnecessarily exacerbates the danger of media self-censorship. . . ." *Id.* at 349-350 (emphasis added).

Second, Justice Powell noted that "the doctrine of presumed damages invites juries to *punish unpopular opinion* rather than to compensate individuals for injury sustained by the publication of a false fact. . . . *juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views.*" *Id.* at 349-350 (emphasis supplied). See also *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 50, note 14 (1979) ("punitive damages may be used as a *weapon to punish unpopular defendants*").

As is evident in this record, the State of California did not move in on a large, in-state, "established" religious denomination with political clout in the community and make an issue of the sale of religious tracts and pamphlets in the foyers of their churches. As was the case in *Murdock*, the force of the law was brought to bear with special force against a vulnerable, out-of-state televangelist. This further concern about the actual operation of imposing a tax collection liability on a fledgling

national religious ministry may further chill the outreach efforts of that group.

Appellee would have this Court unleash the administrative discretion of the taxing authorities on the churches in the exercise of their religious ministry without any serious limits to that discretion arising out of deference to delicate First Amendment values. As this record makes all too plain, the tendency of zealous tax officials to overbear a recalcitrant taxpayer by threatening criminal sanctions knew no limits even in the discretionary application of such threats to a bona fide religious ministry. See Letter of Lamb to counsel for appellant, cited *supra*, at 16. As Justice Brandeis stated in another context, "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning, but without understanding." *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

One very good reason why this Court should not give the appellee a free hand to tax religious ministry is the inevitability that, given a free hand, the taxman would strike some religious ministries, but not others. The de facto preferences given to those religious groups whose practices the taxman chooses to ignore are the very thing that the establishment concern of the religion clause is meant to avoid. *Larson v. Valente*, 456 U.S. 228 (1982). In *Larson*, this Court held that governmental action that favors churches that rely on one form of fund-raising over others is subject to strict scrutiny and can be upheld only upon a finding of compelling govermental justification.

After *Hernandez v. Commissioner of Internal Revenue*, 109 S. Ct. —, Nos. 87-693 and 87-1616 (1989), it seems that this Court will require the showing of a compelling state interest in a tax case only where a tax statute is plainly discriminatory on its face. But that misses the point that administrative discretion, unguided

and unchecked, can work significant mischief by applying "with an evil eye and an unequal hand" a law that is "fair on its face and impartial in appearance." *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374 (1886); see also *Lakewood v. Plain Dealer Publishing Co.*, 108 S.Ct 2138 (1988). At the very least, this Court should not be blind to the obvious reality that states will overlook tax enforcement that is not economically or politically feasible, and the concomitant danger that the type of taxes at issue in this case will be selectively enforced more frequently against highly visible or unpopular ministries than on large and popular denominations. To impose a tax on religious bodies that distribute religious materials to their adherents in "exchange" for a payment or donation, but not on those that raise money from their adherents in other fashions, violates the principle announced in *Larsen v. Valente, supra.*

Here the potential threat to protected activity is not the imposition of damages in a libel action, but an official act purporting to transform the church into an agency of the state for purposes of tax collection. Here the danger to First Amendment values is posed by the high cost of compliance with the administrative burden of collecting and remitting use tax for the distribution of religious literature. The net result in both contexts is the same. Protected activity will be chilled unless the Court fashions a First Amendment limit on the governmental acts that produce the chilling effect.

This Court has intimated in dicta that *equal* treatment of non-commercial religious organizations and commercial news organizations may be about as far as the First Amendment ought to go. *Arkansas Writers' Project, Inc. v. Ragland*, 107 S. Ct. 1722 (1987); *Minneapolis Star and Tribune Co. v. Minnesota Com'r of Rev.*, 460 U.S. 575 (1983). Amici, however, suggest that there are important reasons why religion enjoys special constitutional protection that is not afforded to commercial

activities. First, unlike for-profit corporations such as the media defendants in *Sullivan* and *Philadelphia Newspapers*, appellant and the amici are *not-for-profit* religious organizations entitled to the full protection afforded to their ministries by the religion clauses of the First Amendment.[10] As Justice Brennan observed in *Amos*, the distinction between for-profit activity and not-for-profit activity may be crucial to the determination of whether a religious organization is entitled to special treatment in its employment policies. 107 S. Ct. at 2872 (Brennan, J., concurring).[11]

Second, religious freedom is not merely a redundant way of saying freedom of speech and of the press. The text of the First Amendment itself singles out religion for special protection.[12] For example, religion is unique among our freedoms in part because government is pro-

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[10] In his concurring opinion in *Texas Monthly*, Justice Blackmun did not endorse the view that a religious exemption is infirm if not also enjoyed by every imaginable charitable organization, but simply noted, correctly in the view of amici, that the benefit of the religion clauses of the First Amendment extend to a wide variety of religious claims and of views about transcendence. 109 S.Ct. at 906.

[11] The consistency of this rule is underscored in the brief amicus curiae filed by the National Council of Churches in this case. In this brief, the amicus notes that religious organizations have since 1976 been under a legal obligation to pay tax on income derived from business that is not related to the exempt purpose of the religious organization. See Amicus Brief of National Council of Churches. The record in this case makes plain that this case is narrowly focused on the power of the government to tax the churches in the direct transmission of their religious messages to willing believers.

[12] See McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1, 9; Esbeck, *Toward a General Theory of Church-State Relations and the First Amendment*, 4 Pub. L. Forum 325 (1985); and Pepper, *Reynolds, Yoder and Beyond: Alternatives for the Free Exercise Clause*, 1981 Utah L. Rev. 309, 347 n. 171 (religion is inherently valuable, vulnerable, and worthy of special protection).

hibited from directly engaging in or promoting religion, but is not forbidden from entering the "marketplace of ideas" as one of the speakers.

Third, precisely because of the expanding scope of regulation in the modern welfare state, this Court should recognize the special character and needs of religion in today's society, in order to maintain the vitality and independence of religious life as it was at the time of the framing of the First Amendment.[13]

Finally, this Court should give special protection to religious freedom because it is the first of our civil liberties and the predicate for our other freedoms. In the words of the Williamsburg Charter:

> "The First Amendment Religious Liberty provisions have both a logical and historical priority in the Bill of Rights. They have logical priority because the security of all rights rests upon the recognition that they are neither given by the state, nor can they be taken away by the state. Such rights are inherent in the inviolability of the human person. History demonstrates that unless these rights are protected our society's slow, painful progress toward freedom would not have been possible. The First Amendment Religious Liberty provisions lie close to the heart of the distinctiveness of the American experiment. . . . If religious liberty is neglected, all civil liberties will suffer. If it is guarded and sustained, the American experiment will be the more secure."

The Williamsburg Charter: A National Celebration and Reaffirmation of the First Amendment Religious Liberty Clauses at 11-12 (1988).[14]

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[13] See, e.g., Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 Harv. L. Rev. 513, 522-526 (1968); McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1, 22.

[14] This document was signed by national leaders in Williamsburg, Virginia on the 200th anniversary of the call for a Bill of

Thus, to the extent that an exemption for religious organizations is both narrowly focused on the appropriate reasons that give rise to it and broadly available to all competing religious views,[15] a stronger claim can be made for a carefully tailored exemption of this sort than for the view of the plurality in *Texas Monthly* that an exemption is presumptively invalid if expressly grounded in free exercise concerns and thus unavailable to those who do not fall even within a broad, all-encompassing definition of religion. *Welsh v. United States*, 398 U.S. 333, 342 (1970); *United States v. Seeger*, 380 U.S. 163 (1965). For example, those who seek an exemption from military service may not claim it if the basis for their objection to this general requirement stems solely from political opposition to governmental policy. *Welsh*, *supra*, 398 U.S. at 342; *Seeger*, *supra*.[16] Nor did this Court see fit to extend to free speech advocates of educational pluralism the exemption from Wisconsin's compulsory school attendance law that was required in *Wisconsin v. Yoder*, 406 U.S. 205, 216, 233 (1972).

The application of the chilling effect rationale to the context of religious freedom is by no means novel. For example, in *Sherbert v. Verner*, 374 U.S. 398 (1963),

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Rights, June 25th, 1988. A copy of this document has been served on the parties and all amici, and has been deposited with the Librarian of the Court.

[15] See *Texas Monthly*, *supra*, 109 S. Ct. at 906 (Blackmun, concurring).

[16] Exemption from military service is, moreover, an excellent illustration of an accommodation of religion that has been deemed appropriate in our society since the time of the First Continental Congress, although it is not constitutionally required. See McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1, 22-23. It is far too late in the day to maintain that an exemption is permissible under the establishment clause only if required under the free exercise clause. See, e.g., *Walz*, *supra*, 397 U.S. at 673 (permissible state accommodation of religion not limited to the noninterference mandated by the free exercise clause).

this Court invalidated an impermissible condition upon the receipt of a welfare benefit that would have deeply affected the religious freedom of the welfare claimant. As Justice Brennan noted in *Sherbert*:

> "the pressure upon [the welfare claimant] to forego the practice of her religion is unmistakable. The ruling forces her to choose between following the precepts of her religion and foregoing benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against her for her Saturday worship."

Id., 347 U.S. at 404.

More recently, in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), this Court declined to enforce the purported jurisdiction of the National Labor Relations Board over church-operated secondary schools. Finding "no clear expression of an affirmative intent by Congress" to include teachers at church-operated schools within the Board's jurisdiction, the Court chose in this way to avoid the resolution of "difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." *Id.* at 504, 507. It did so not because the prospect of collective bargaining by teachers in parochial schools posed a threat to the doctrinal or ethical beliefs of Roman Catholics, which since the late nineteenth century has expressly taught that workers should enjoy the right to organize and to bargain collectively over terms of employment. The reason why this Court declined to extend the jurisdiction of the Labor Board over the church-operated school in *Catholic Bishop* was that the attendant risk of litigation over unfair labor practice charges might deter the bishop's exercise of his right to control the religious mission of the school. *Id.* at 502-504. See also *Corp. of Presiding*

Bishop v. Amos, 107 S.Ct. at 2873 (1987) (Brennan, J., concurring) (danger of chilling religious activity by close judicial inspection of its character.)

Where, as here, amici can show that a state policy would clearly have a chilling effect on the free exercise of religious ministry, this Court should rely on the chilling effect rationale to afford to protected religious activity the "breathing space" it needs to flourish. *NAACP v. Button*, 371 U.S. 415 (1963). It is especially troubling that the imposition of a cumbersome duty to collect taxes from religious adherents will operate to chill the distribution of religious literature. The chilling effect on this form of ministry will be greatest in situations such as this case where the minister is attempting to reach the "unchurched," or those without any religious convictions. This reality disproportionately burdens one of the few absolutely protected constitutional rights—the right of the religious speaker to announce one's own religious faith to all who care to hear it, and the right of the potential believer to uninhibited flow of information directly related to the precious right of religious conversion. A chilling effect that has its greatest impact on the exercise of these rights is especially offensive to the First Amendment.

Like the early Christian church, national evangelical ministries typically grow slowly from state to state. In the experience of amici, it takes many years of ministering throughout the country before a significant body of followers is developed. It is often only after a long period of such development that the leadership of these evangelical ministries begins pastoral visitation of the followers in many of these states. The timing of such pastoral visits is surely one of those religious "usages and customs" that this Court long ago deemed beyond the power of government to influence or control. *Watson*, *supra*. The free exercise of a pastor to visit his flock and the free exercise of a national religious ministry

to distribute religious literature to its adherents must not be restricted to those willing to bear the considerable burden of compliance with one of the most complex and confusing taxes ever designed by governmental officials.

CONCLUSION

For these reasons, the judgment of the Court of Appeal of California should be reversed.

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